FOR ARGUMENT

Supreme Court, U. S.
FILED
SEP 22 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-567, 75-577

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

— AND —

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Petitioner,

v.

STATE OF OREGON, Acting by and through the State Land Board,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

---

STATE OF OREGON'S SUPPLEMENTAL BRIEF

LEE JOHNSON
Attorney General
W. MICHAEL GILLETTE
Solicitor General
PETER S. HERMAN
Senior Counsel
100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Counsel for Petitioner

SUBJECT INDEX

	Page
Introduction	1
Corrective Statement of Facts	2
Conclusion	8
Appendix	9

In The Supreme Court Of The United States

OCTOBER TERM, 1975

Nos. 75-567, 75-577

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

—AND —

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Petitioner,

v.

STATE OF OREGON, Acting by and through the State Land Board,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

STATE OF OREGON'S SUPPLEMENTAL BRIEF

I
INTRODUCTION

Corporation has filed a reply brief in Case No. 75-577. This brief injects a wholly new and spurious issue as to the navigability of the Willamette River at the location of the property in dispute. The brief is

highly improper because it (1) purports to impeach corporate counsel's own stipulation as to navigability; (2) ignores undisputed evidence in the record on navigability; and (3) makes misleading and improper use of a 1976 letter of the United States Corps of Engineers. Since the spurious issue of navigability attempts to negate the Court's jurisdiction in Case No. 75-567 and the state's position as respondent in Case No. 75-577, the state requests leave of the Court to file this brief as either a supplemental brief of petitioner in Case No. 75-567, under Rule 41(5), or as a brief necessary to correct the misleading matter presented by petitioner in Case No. 75-577.

II

CORRECTIVE STATEMENT OF FACTS

Petitioner states as "facts" in its reply brief, in Case No. 75-577, that

> "The Willamette River above Corvallis, where the disputed property is located, *is not considered navigable in its ordinary condition* by the federal government. (App 2)" (No. 75-577 Reply Br at 2; Emphasis added).

And, at page 3, petitioner states:

> *"The disputed portion of the Willamette River is not 'navigable'* in the opinion of the Corps or under the definition requiring that the waters be suitable for commerce, trade and travel. It is properly designated a 'floatable' stream *the proprietary ownership of the bed being vested in the riparians."* Emphasis added).

At page 8, petitioner also states:

> "The Willamette River above Corvallis is not navigable. (App 2) [On trial Corvallis Sand and Gravel Company acknowledged this portion of the Willamette River to be navigable. This was on the basis of state law.]" (Bracketed material in original).

In support of these "facts" counsel cites in an appendix to his reply brief a letter from the Corps of Engineers, stating that "no dredging has ever been performed upsteam of Corvallis" and that "[t]he Flood Control Act of 28 June 1938 provides for improvement of the Willamette River including a channel 2 to 2½ feet deep from Corvallis to Eugene . . . [but d]evelopment of a navigation channel above Corvallis is not economically feasible." (No. 75-577 Reply Br. at 2, 8; App 5).[1]

The foregoing "facts" and argument of petitioner are misleading, wrong and improper for the following reasons:

1. Corporation's petition for certiorari in Case No. 75-577 stated two questions for review, both of which recognized the Willamette as "a navigable fresh water stream." (No. 75-577 Pet at 2, 3).

2. Corporate counsel himself had stipulated to the river's navigability in the trial below:

"MR. MIX: Okay. The state first asks that we

[1]The river distance from Corvallis to Eugene is approximately 53 miles.

References in petitioner's reply brief to "App. 2" in support of its navigation "facts" appear to be in error; Appendix 5 appears to be the relevant document.

stipulate to the fact that *Willamette River is navigable, we so stipulate.* The second thing the state asks us to stipulate is to certain aspects of the damages, we are unable to do this.

"MR. HERMAN: Okay." (Tr 16; Emphasis added).

3. In an excess of caution, the state placed in the record evidence of navigability of the river at the location in dispute. (Tr 65-67, 412-414). This evidence is overwhelming:

(a) Exhibit 114 consists of pages 906 and 907 of the Corps of Engineers report of 1871. (Tr 65-67, 412-414). This report shows that steamboats "[d]uring a high-water stage of the river, . . . run up as far as Eugene City, about eighty miles above Salem." (Jt App 119).

(b) Exhibit 115 includes the Corps of Engineers annual report of 1875 (Tr 65-67, 412-414); this report discusses the removal of snags below and above Corvallis by the United States snagboat. The report discusses the removal of snags at the mouth of the Booneville Slough, "four miles above Corvallis." (Ex 115 at 761-762; Jt App 139). Snags would not be cleared from a channel unless it was a channel used by steamboats and other commercial traffic which the report clearly indicates was the fact for areas above Corvallis. The report also described the City of Eugene as

> ". . . *usually considered the head of steam-navigation for light-draught boats during average stages of high water,* and only continuing for a few months of each year. Boats have ascended as high up as Springfield, some six miles above Eugene. . . ." (Jt App 148; Emphasis added).

(c) Exhibit 115 also includes page 1836 of the Corps of Engineers annual report of 1879 (Tr 65-67, 412-414); the report shows that the Corps of Engineers snag boat was moving up the West Channel of the Willamette River, "removing all obstructions as far up as Booneville, six miles above Corvallis, a shipping point of importance."[2]

(d) The Hyde field notes, pages 607 to 608 (also paginated 127 to 128) also mentioned the town of Booneville, and states that steamboats have been up to it in high water. (Ex 85; Tr 65-67, 412-414).[3]

(e) The report of K. M. MacDuffee, Assos., *Navigation Upper Willamette River, 1846-1936,* particularly pages 1, 4, 5, 14, 15 and 16, show extensive steamboat travel between Corvallis and Eugene prior to Oregon's admission into statehood and thereafter. (Ex 154; Tr 65-67, 412-414).[4]

4. The trial court found the river to be navigable as

---

[2]This particular page (1836) of Exhibit 115 was not included in the joint appendix because no issue had been raised as to the navigability of the Willamette River. We also call to the Court's attention that the transcript references are to page "1936" rather than "1836". The correct page is 1836 and is a part of Exhibit 115 which is before the Court.

[3]This exhibit is with the Oregon Supreme Court; as there was no issue of navigability, it was not included among the exhibits certified to this Court by the Oregon court.

[4]See note 3, *supra.*

to the section of the river which included the property in dispute:

> "The Willamette River was a navigable river at the time of Oregon admission into the Union in 1859, and is now navigable, in that section of the river *between its confluence with the Mary's River and upstream to the present site of the City of Corvallis Water Treatment Plant.*" (Jt App 176; Emphasis added).

5. Based on this conclusion, the trial court concluded:

> "The State of Oregon acquired title to all lands within its borders lying between the ordinary high water mark and the ordinary low water mark of all navigable streams when it was admitted to the Union. This acquisition of title by the State was by virtue of the State's sovereignty. Private ownership of the lands lying between the high and low water marks of the Willamette River, must therefore be by grant from the State of Oregon. These lands cannot be sold or otherwise disposed of by the State so as to prevent their use by the public of the navigable waters for navigation and fishing.
>
> "The ownership, if any, of the Defendant in these lands must therefore be traced to a conveyance, or its equivalent, from the State of Oregon. Ownership in the State is presumed to continue until the State is shown to have parted with its title." (Jt App 176-177).

6. The Oregon Court of Appeals also treated the river as navigable, stating in note 1 of its opinion

> "Neither party contests the fact that the Willamette River is navigable in the area involved in this litigation." 18 Or App 524, 531, 526 P2d 569, 573 (Jt App 198).

Petitioner in its subsequent requests for review or rehearing never challenged this statement.

7. Finally, the letter in question is improperly before the Court because it is not part of the record. Moreover, it does not purport to state that the Willamette River above Corvallis was not navigable at the time of statehood for the purposes of bed ownership nor, for that matter, does it state that that section of the river is not navigable today. In any event, if the Court is to consider this correspondence it should also consider other 1976 correspondence between Mr. Mix, counsel for corporation, and the Corps of Engineers (this other correspondence is omitted from the appendix to petitioner's reply brief) which unequivocally shows that the Corps of Engineers has treated, and now treats, the Willamette River between Corvallis and Eugene as navigable waters of the United States. (See Appendix to this Supplemental Brief, *infra, particularly page 13).*

III
CONCLUSION

The State of Oregon submits that the record makes clear that the Willamette River is navigable under the federal test for title purposes and that the Court should disregard corporate petitioner's improper attempt to inject this spurious issue into the case at this time.

Respectfully submitted
LEE JOHNSON
Attorney General*
W. MICHAEL GILLETTE
Solicitor General
PETER S. HERMAN
Senior Counsel
Attorneys for Respondent
September, 1976

APPENDIX
(Corps of Engineer Correspondence)

NPPND-WM-2 28 May 1976

Mr. Robert Mix
Attorney at Law
745 N.WE. Van Buren
Corvallis, OR 97330

Dear Mr. Mix:

Your letter of 13 May requested information on maintenance of a navigation channel in the Willamette River upstream of Corvallis. Our records show that no dredging has ever been performed upstream of Corvallis.

The Flood Control Act of 28 June 1938 provides for improvement of the Willamette River including a channel 2 to 2½ feet deep from Corvallis to Eugene. In 1904 the reach between Harrisburg and Eugene was determined unworthy of improvement and no work has been accomplished. Development of a navigation channel above Corvallis is not economically feasible.

If we can be of further help to you in this matter, please feel free to call on us.

Sincerely,

A. J. HEINEMAN
Chief, Navigation Division

ROBERT MIX
ATTORNEY AT LAW
CORVALLIS, OREGON 97330

745 N.W. Van Buren

May 13, 1976

Department of the Army
Portland District
Corps of Engineers
P. O. Box 2946
Portland, Oregon 97208

Dear Sir:

Would you please advise me as to whether or not work is performed routinely on the Willamette River upstream from Corvallis for the purpose of keeping the channel navigable.

It is my recollection I read in the newspaper several months ago that the Corps no longer was performing such work.

Thanks for your help.

Sincerely yours,

ROBERT MIX

RM:ms

NPPND-RF-1 28 January 1976

Robert Mix
745 N.W. Van Buren
Corvallis, OR 97330

Dear Mr. Mix:

In response to your written inquiry dated 26 January 1976. Although we do not conduct continuous channel maintenance, the Willamette River is considered navigable up to mile 183.2 in Eugene, Oregon.

The term "navigable waters of the United States" is administratively defined to mean waters that have been used in the past, are now used, or are susceptible to use as a means to transport interstate commerce.

If we can be of further assistance, do not hesitate to call on us.

Sincerely,

F. R. BROCKSCHINK
Chief, Regulatory Functions
Branch

ROBERT MIX
ATTORNEY AT LAW
CORVALLIS, OREGON 97330

745 N.W. Van Buren

January 26, 1976

Corps of Army Engineers
2850 S.E. 82nd
Portland, Oregon 97266

Dear Sir:

This is to inquire as to whether or not the Willamette River above the VanBuren Street bridge in Corvallis is any longer considered "navigable". It is my understanding the Corps has ceased to conduct channel preservation activities, such as dredging, above Corvallis and that this portion of the stream in effect has been abandoned so far as navigation is concerned.

Thank you for your help in this matter.

Sincerely,

ROBERT MIX

RM:ms